IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 31

GWENDOLYN HOYT,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

BRIEF FOR APPELLANT

GOULSTON & STORRS
50 Federal Street
Boston, Mass.

HARDEE & OTT
308 Tampa Street
Tampa, Florida

Of Counsel:

HERBERT B. EHRMANN
50 Federal Street
Boston, Mass.

RAYA S. DREBEN
50 Federal Street
Boston, Mass.

Counsel of Record for Appellant

C. J. HARDEE, JR.
308 Tampa Street
Tampa, Florida

CARL C. DURRANCE
308 Tampa Street
Tampa, Florida

Counsel for Appellant

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I.

Reference to the Reports of the Opinions Delivered in the Courts Below.

The opinions of the Supreme Court of Florida (R. 30-47) are reported in 119 So. 2nd 691.

II.

Jurisdiction of This Court

Jurisdiction of this Court rests on 28 U.S.C. §1257(2) and 28 U.S.C. §1257(3). Appellant was convicted of murder in the second degree and sentenced to thirty years hard labor. The statute here challenged, §40.01(1) Florida Statutes, is one of the provisions governing the selection of jurors who tried the Appellant. Also challenged is the action of the jury commissioners in selecting the jury.

The final judgment of conviction, order and sentence of the Criminal Court of Record of the County of Hillsborough and State of Florida was entered on January 20, 1958 (R.

29). The Supreme Court of Florida affirmed the conviction of Appellant in a majority decision on December 2, 1959 (R. 30), and denied Appellant's Motion for Rehearing in a majority decision on April 20, 1960 (R. 44). The Notice of Appeal was filed and served on April 20, 1960 (R. 48), and was timely under Rule 11 of the Rules of the Supreme Court of the United States.

III.

The Constitutional Provisions and Statutes Involved.

The Statute challenged as unconstitutional under the Fourteenth Amendment is Florida §40.01(1) (1 Fla. Statute 1959—167):

> "Grand and petit jurors shall be taken from the male and female persons over the age of twenty-one years, who are citizens of this state, and who have resided in the state for one year and in their respective counties for six months, and who are duly qualified electors of their respective counties; provided, however, that the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit cour. her desire to be placed on the jury list."

Also challenged is the action of the jury commissioners in applying §40.01(1) and §40.10 (1 Fla. Statute 1959—169). Sec. 40.10 reads as follows:

> "The jury commissioners in counties described in 40.09 shall select and list 10,000 inhabitants of such county known or believed to be qualified under the law to be jurors, who, even if exempt, have not filed a written claim of exemption from jury duty as hereinafter provided. No juror's name shall be drawn twice for jury duty until the above list has been exhausted. In making

the selections and preparation of said lists, the jury commissioners may confer with the judge or one or more of the judges of the circuit court of such county, and shall have the power, without charge or cost, to examine, at any reasonable time all documents and records in the office of the clerk of the circuit court and of any other county officials as to persons who have been listed, summoned, not found, served or excused as jurors, and all books, records, and lists in the office of the supervisor of registration or other county official containing the names of electors of such county. The clerk of the circuit court shall furnish or cause to be furnished the necessary clerical aid to the commission."

Appellant's conviction was under Florida Statute §782.04 (2 Fla. Statute 1959—3077). Sec. 782.04 reads as follows:

"When perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual it shall be murder in the second degree, and shall be punished by imprisonment in the State Prison for life, or for any number of years not less than twenty years."

The relevant portion of the Fourteenth Amendment is the first section thereof, which reads as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

IV.

Questions Presented

1. Whether a female defendant may constitutionally be convicted of murdering her husband by a jury selected pursuant to a Statute which systematically excludes women from jury service by limiting jury service to those women who volunteer.

2. Whether jury commissioners may, without depriving a female defendant of her constitutional rights, discriminate against women in compiling the jury lists by arbitrarily and systematically limiting the number of women on such lists.

V.

Statement of the Case

Appellant was tried and convicted of second degree murder of her husband by a jury composed entirely of men, and drawn from a list from which, as hereinafter described, all women were virtually excluded.

The issues before the all-male jury involved the determination of a woman's state of mind. The information followed the statutory definition of second degree murder and charged her with "an act evincing a depraved mind regardless of human life." She pleaded not guilty and not guilty by reason of temporary insanity.

In the words of Judge Drew:

> "The homicide occurred at the parties' home when appellant, after prolonged marital discord and alleged infidelities, called her husband from his military station in another city by a false report of injury to their young son. She was unable to salvage their relationship by any means, when she was so informed by the deceased

> in a final and unequivocal fashion at the unfortunate moment when she was disposing of a damaged baseball bat, the fatal blows were struck. Immediate medical attendance could not repair the extensive head injuries which resulted in death the following day. Appellant gave a full account of events, which are not materially in dispute . . ." (R. 30).

The male jurors had to weigh the effect on Appellant of the extra-marital activities of her husband, and his callous flaunting of them (R. 37). They had to weigh the effect of Appellant's epilepsy which resulted in damage to that portion of her brain controlling the emotions (R. 37-38). As put by the majority opinion, they had to determine whether or not the "course of events affecting the marital relationship" produced "in defendant such a state of mind as to relieve her from criminal responsibility for her acts"[1] (R. 36).

The facts which led almost inevitably to a selection of an all-male jury to try these issues were brought out at the pre-trial hearing of December 5, 1957, held on Appellant's Amended Challenge to the Jury Panel (R. 8-25).

Appellant's Challenge (R. 4-7) rested on two grounds, namely that Sec. 40.01(1) was contrary to the Constitutions of the State of Florida and the United States; and that the names of women were "arbitrarily, systematically and intentionally excluded from the list."

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[1] In this connection the majority of the Florida court upheld the introduction of evidence showing that an unidentified man had hired a baby-sitter for Appellant, that the caller had given an assumed name for Appellant but her correct address; and that she had gone on a date with an unidentified man (R. 35-36). The minority opinion concluded that this evidence was inadmissible on any theory, and that it "was intended by the county solicitor to prejudice the jury against her" (R. 39).

The Statute challenged by Appellant provides "that the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list." In 1957, the year Appellant was convicted, there were 114,247 registered voters in Hillsborough County, of whom 46,000 or forty percent were women (R. 23). Only two hundred eighteen or two hundred twenty women had registered their desire to serve as jurors (R. 16, 12), and of this number, only thirty to thirty-five had registered since 1952 (R. 12).

The jury commissioners in compiling the jury lists were required each year to make up a panel of 10,000 names (R. 9). In making up this list, the jury commissioners had to draw from the qualified male electorate, and from the women who had registered for jury service.

James Lockhart, one of the jury commissioners, and Katherine McPhillips, the clerk who actually compiled the list in 1957, testified as to the procedure in selecting the names of women. Mr. Lockhart stated that every year there is a new jury list, and that every year the names of ten or twelve women are placed on the list (R. 13). The average for the last four years prior to 1957 was ten or twelve women (R. 12).

Katherine McPhillips stated that she had been instructed to look at the lists of previous years to get the names of women[2] (R. 17). She stated that the reason she put on ten is that she went back two, three or four years and noticed how many women had been put on before, and that she had put on approximately the same number (R. 17).

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[2] It is not clear from her testimony whether she looked at the lists of previous years to determine the number of women to put on in 1956 or to determine the actual names and to use those same names time and again. Needless to say, the latter would be even more improper than the former.

In 1957 there were seven thousand names left from the 1956 list, and Miss McPhillips testified that only three thousand or twenty-five hundred names were added to the list in 1957 (R. 17-18). Throughout the year 1956, not a single female juror had been drawn (R. 46), for Miss McPhillips testified that there were still ten names left in the box from the 1956 list (R. 20). In compiling the 1957 list, she did not add the names of any women at all (R. 25), nor did she even refer to the list of women who were registered (R. 19). It may be appropriate to quote once more a small portion of Miss McPhillips' testimony in respect to this point (R. 19-20).

Redirect Examination by Mr. Durrance (Appellant's Attorney):

"Q. In other words, you did not use this book which you have at the present time which the clerk keeps downstairs for the registration of women who desire to serve on the jury? You did not use that book when you added these 2500 names on March 8, 1957?

A. No.

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Recross Examination by the State:

Q. A minute ago you testified that each year you put ten additional names in there because they had used ten before?

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Q. What did you mean by that? I don't understand that.

A. What I mean is that we had ten women in the 7,000 names left that had not served. Had not served. So, we did not take their names out of the box, or out of the file that we use to compile the list and put them

in a 'Served' file. So, we still had ten ladies' names left in the box from the 1956 list."

Despite this evidence, and perhaps because of an arithmetical error, the trial court ruled adversely on Appellant's Challenge to the Jury (R. 24-25). The court pointed out that there were 68,000 eligible male jurors in the county, and that there were 275 eligible female jurors. He correctly pointed out that of the 10,000 in the box, there were approximately ten women in the box, and the rest, men. He went on to say, "On the eligibility list, that would represent about 27 per cent of the eligible women, and about 15 per cent of the eligible men, so I believe, percentage-wise, . . . that there certainly isn't any discrimination of the nature of which you complain. Percentage-wise there . . . were more women put in the box . . . than there were men."

The judge's computations are wrong. The correct computation shows that the panel included less than four per cent of the eligible women, not twenty-seven per cent.

At the conclusion of the trial, the all-male jury found the Appellant guilty of murder in the second degree (R. 28). Appellant was sentenced to thirty years hard labor (R. 29). The Supreme Court of Florida affirmed, two judges dissenting on non-Constitutional grounds. A Petition for Rehearing was denied, with two dissents, Judge Hobson dissenting on the Constitutional grounds.

VI.

Argument

A. Sec. 40.01(1) Florida Statutes, Deprives Appellant of the Equal Protection of the Laws.

1. *The Statute Has the Effect of Excluding Women From Jury Service.*

The undisputed facts brought out at the pre-trial hearing show conclusively that the effect of the Statute is to exclude all but a very small number of women from juries in Hillsborough County. Although forty-six thousand women were qualified electors in 1957 (R. 23), only two hundred twenty (R. 12), or at most two hundred seventy-five (R. 24), women volunteered for jury service. Thus, while women constituted forty percent of the total electorate (R. 23), and more than half of the population of the county,[3] volunteers for jury service constituted less than 6/10 of 1% of the women electors. Moreover, in the five years from 1952 to 1957, only thirty-five women registered in all (R. 12).

Other studies confirm these figures and show that when women have to volunteer in order to serve on juries, very few women volunteer.[4]

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[3] *1950 Census of Population*, Vol. 2, *Characteristics of the Population*, Pt. 10, Florida, Table 41, pp. 10-85, indicates that in 1950, the population of Hillsborough County was 122,976 males and 126,918 females.

[4] Hicks, Julia Margaret, *Women Jurors*, National League of Women Voters, p. 16 (1928).

2. *The Equal Protection Clause of the Fourteenth Amendment Prohibits Exclusion from Jury Service of Members of a Defendant's Class.*

This Court has consistently held that the exclusion of members of a defendant's class from jury service is a denial of equal protection of the laws. *Strauder* v. *West Virginia*, 100 U.S. 303, the landmark case, is particularly important to the case at bar, since it is relied upon by the Appellee to sustain the Statute's constitutionality.

Strauder involved a negro defendant convicted of murder by a jury constituted in accordance with a West Virginia Statute limiting jurors to white males. The conviction was reversed. The court pointed out that the words of the Fourteenth Amendment contain certain positive rights valuable to the colored race. Its members were entitled to be exempt from unfriendly legislation against them distinctively as a class, and to be free of legal discriminations implying inferiority in civil society and to enjoy the rights which others enjoy (pp. 307-308).

After stressing that prejudices often exist against particular classes which sway the minds of jurors and which, therefore, deny to persons of those classes the full enjoyment of protections which others enjoy, the court asked:

> "... how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal protection?" (p. 309).

The court emphasized that exclusion on the basis of race or color, and not exclusion for lack of qualification, was what was objectionable. This careful limitation was obviously necessary, for only eleven years before, "education

of negroes was almost non-existent and practically all of the race were illiterate".[5]

The court in the *Strauder* opinion then added:

> "We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing, make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages or to persons having educational qualifications" (p. 310).

It is this last statement which was relied upon by the majority opinion of the Florida Court (R. 32), and is now urged upon this Court by the Appellee (Appellee's Motion to Dismiss, pp. 3-4). However, this statement must be accepted merely for what it was,—namely, an illustration applicable to the American society of 1879.[6] It was not a

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[5] This description of negro education in 1868 was made by this Court in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, at p. 490.

[6] Until after the Civil War, public education for women in this country was practically non-existent. Extremely limited facilities were available to girls on all levels, elementary school, high school and college. For example, so many girls wanted admission to the only Boston High School open to them, that the school was closed eighteen months after its opening, because the city was unwilling to finance the institution. Bitter laments on the status of women's education are found in the annals of the Women's Rights Convention of 1851. See: Goodsell, Willystine, *The Education of Women*, pp. 22-23 (New York 1923); Davis, Paulina, *On the Education of Females*, Women's Rights Tracts No. 3 (1853); Taylor, Harriet C., *Enfranchisement of Women*, Women's Rights Tracts No. 4 (1853); and Reid, Mrs. Hugo, *Women, Their Education and Influence*, pp. 158 & 176 (New York, 1848).

The current picture is, of course, quite different. For example, in Florida in 1950, the median number of school years completed was *higher for females* than for males *at every age* between 7 and 75. *1950 Census of Population*, Vol. 2, *Characteristics of the Population*, Pt. 10, Florida, Table 64, pp. 10-163.

Constitutional mandate for all time. The reasoning of the *Strauder* court and the context of the statement, rather than the statement itself, is the precedent which concerns us. See *Reid* v. *Covert*, 354 U.S. 1, 50-51 (concurring opinion).

It is to be noted that the *Strauder* case did not limit discriminations in jury selections to race or color, the court saying, "Nor if a law should be passed excluding all naturalized Celtic Irish, would there be any doubt of its inconsistency with the spirit of the Amendment" (p. 308).

In an unbroken series of cases,[7] this Court has followed *Strauder* v. *West Virginia*, 100 U.S. 303. The decision in *Hernandez* v. *Texas*, 347 U.S. 475 clearly reaffirms the *Strauder* dictum *holding* that the equal protection clause extends beyond discrimination on grounds of race or color.[8] In finding that Texas improperly excluded Mexicans from jury service, this Court stated:

> "Throughout our history, differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time, other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community, is a question of fact. When the existence of a distinct class is demonstrated and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not directed solely against discrimina-

[7] Listed in *Eubanks* v. *Louisiana*, 356 U.S. 584 at Footnote 1.

[8] Cmp. this with *Fay* v. *New York*, 332 U.S. 261 at pp. 283-284.

> tion due to a 'two-class theory',—that is, based upon differences between 'white' and 'Negro'" (p. 478).

Had Appellant been a member of any class other than women, the exclusion of members of her class on that basis alone, would have been improper.

Moreover, this Court has never held that a woman is not denied equal protection of the laws when members of her sex have been excluded from the jury.

The only two opinions at all relevant are *Strauder* v. *West Virginia*, 100 U.S. 303 and *Fay* v. *New York*, 332 U.S. 261. But, neither of these cases involved a woman defendant. *Strauder* merely mentioned women in the context of qualifications for jurors. *Fay* v. *New York*, 332 U.S. 261 discussed the problem of exclusion of women more fully, and held that, in the absence of prejudice, it is necessary to rely on Congressional legislation to show a denial of equal protection. This is no longer the view of this Court. *Hernandez* v. *Texas*, 347 U.S. 475, has expanded the scope of the equal protection clause. Moreover, *Fay* v. *New York*, 332 U.S. 261, is clearly not binding, since here Appellant is a member of the class excluded. A further distinction may be found in the fact that the nature of Fay's offense (conspiracy to extort and extortion) was such that it could hardly be said that the absence of women from his jury might have been prejudicial or injurious.

Wherever this Court has dealt with exclusions of members of the same class as the defendant, this Court has held the exclusion improper. In *Ballard* v. *U. S.*, 329 U.S. 187, this Court held the exclusion of women improper where the defendant was a woman, the Court saying that the exclusion of women from jury panels "may at times be highly prejudicial to the defendants" (p. 195). The Court went

on to say that reversible error did not depend on the showing of prejudice in an individual case.

> "The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence, one on the other, is among the imponderables. To insulate the courtroom from either may not, in a given case, make an iota of difference. Yet a flavor, a distinct quality, is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded" (pp. 193-194).

See also *Glasser* v. *U. S.*, 315 U.S. 60, at p. 86.

In *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 the blanket exclusion of an economic or social class was held to deprive the jury system of the broad base required in a democratic society. The Court so held even though it did not appear whether defendant was a member of the class excluded.

Although the power of this Court is far broader in cases arising in the federal system, and therefore, these cases are not directly apposite, *Ballard* v. *U. S.*, 329 U.S. 187 recognizes the change in the role of women in our society, and the broader base for jury service required in the Twentieth Century.

This Court has often first applied certain standards to the federal courts, which later, because of changing moral and factual circumstances, have been applied to the states through the due process clause. A very recent example of this is *Mapp* v. *Ohio*, 6 L. Ed. 2nd. 1081 where this Court overruled *Wolf* v. *Colorado*, 338 U.S. 25, and required the

States to follow the federal rule.[9] *Culombe* v. *Connecticut*, 6 L. Ed. 2nd. 1037 and *McNeal* v. *Culver*, 5 L. Ed. 2nd. 445, especially concurring opinion at p. 451, are other recent examples where advancing standards of "what is deemed reasonable and right" for the states approaches the federal rule. This is not to say that the federal rule is one which is required of the states under the Fourteenth Amendment, but rather that this Court recognizes that as our standards of "what is deemed just" expand and develop, what formerly was merely sound judicial procedure becomes a "fundamental right." This is particularly true when new factual data is presented to the Court. As Justice Brandeis said:

> "It is a peculiar virtue of our system of law that the process of inclusion and exclusion, so often employed in developing a rule, is not allowed to end with its enunciation and that an expression in an opinion yields later to the impact of facts unforeseen". *Jaybird Mining Co.* v. *Weir*, 271 U.S. 609, 619 (dissenting).

Appellant submits that in view of the current status of women in American society, the rule expressed in *Ballard* v. *United States*, 329 U.S. 187, should now be adopted as a Constitutional mandate.

3. *Classification of the Florida Statute Denies Appellant the Equal Protection of the Laws.*

Florida recognizes that the educational advances made by women no longer justify exclusion of women on the ground that they are not qualified. The statute qualifies

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[9] The language of *Wolf* v. *Colorado* remains as appropriate as ever: ". . . basic rights do not become petrified as of any one time. . . . it is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights" (p. 27).

women equally with men. However, the Florida court in sustaining the Statute stated:

> "Whatever changes may have taken place in the political or economic status of women in our society, nothing has yet altered the fact of their primary responsibility, as a class, for the daily welfare of the family unit upon which our civilization depends. The statute, in effect, simply recognizes that the traditional exclusion was based not upon inherent disability or incapacity but upon the premise that such demands might place an unwarranted strain upon the social and domestic structure, or result in unwilling participation by those whose conflicting duties, while not amounting to actual hardship, might yet be expected, as a general rule, to affect the quality of their service as jurors" (R. 33).

There is no factual basis today for the assertion that jury service for women places "an unwarranted strain" upon society. Women with young children, and others having pressing domestic duties, would, it is granted, find difficulty in serving. However, a state may provide that these be exempt from jury service.[10] Such women are only a small proportion of the total female population. It is unreasonable to make the difficulties of the few[11] a pretense

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[10] As do, for example, Massachusetts and Georgia.

[11] It is interesting in this connection to read the speech of Wendell Phillips made at the Women's Rights Convention of 1851: "This is the argument: Stephen Girard cannot go to Congress, he is too busy; therefore, no *man* ever shall. Because General Scott has gone to Mexico, and cannot be President, therefore, no *man* shall be. Because A.B. is a sailor, gone on a whaling voyage, to be absent for 3 years, and cannot vote, therefore no male inhabitant ever shall. Logic, how profound! reasoning, how conclusive! Yet this is the exact reasoning in the case of woman. Take up the newspapers. See the sneers at this movement. 'Take care of the children,'—'Make the clothes,'—'See that they are mended,'—'See that the parlors are properly arranged.' Suppose we grant it all. Are there no women but housekeepers? no women but mothers?" Women's Rights Tracts, No. 2, p. 10 (1853).

for the exclusion from jury service of almost all the women of the State.

In 1959, women constituted one third of the labor force of this nation. Seventy-five percent of all single women twenty to sixty-four years of age, and more than thirty percent of all married women are working. Thirty-six percent of all women of working age are in the labor force.[12] Moreover, the proportion of women workers is growing. It is predicted that half of the additional workers in the labor force in 1970 will be women, resulting in a twenty-five percent increase for women workers, as compared with a fifteen percent increase for men.[13] Women with small children constitute a smaller proportion of the labor force, but as their children grow up, more and more women work.[14] Fifty-five percent of all women workers are wives.[15] After age thirty-five, differences in labor force participation rates between single women and married decrease.[16]

These figures are for the Nation, but similar figures apply to the State of Florida. For example, the 1950 Census shows that in Florida, thirty-one and 4/10 percent[17]

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[12] *1960 Handbook on Women Workers,* U.S. Department of Labor, Bulletin 275, p 2.

[13] *Ibid.,* p. 6.

[14] Thus among married women twenty to forty-four years of age, living with their husbands, the average proportion in the labor force varies from eighteen percent for those with children under six, to forty-two percent for those with school age children only, and to sixty-one percent for those with no children under the age of eighteen years. *Ibid.,* p. 41.

[15] *Ibid.,* p. 40.

[16] *Ibid.,* p. 36.

[17] *1950 Census of Population,* Vol. 2, *Characteristics of the Population,* Table 70, pp. 10-186.

of the female population worked. This figure compares with the figure for the Nation in 1950 of thirty-two percent.[18]

Appellant submits that it no longer makes sense to exclude women as a class from jury service. While a state may provide that an occupational group which is insignificant *numerically* may be excluded from jury service for the good of the community, *Rawlins* v. *Georgia*, 201 U.S. 638,[19] it cannot exclude more than half of its population.[20] "Tradition cannot justify failure to comply with the Constitutional mandate requiring equal protection of the laws." *Eubanks* v. *Louisiana*, 356 U.S. 584 at 588.

Most of the states of the Union have recognized this. Thus, at the present time, only three states exclude women from jury service (Alabama, Mississippi, and South Carolina), and three more states provide that only those women who volunteer shall serve on juries (Florida, Louisiana, and New Hampshire). Of the remaining forty-four states, about thirty states make jury service compulsory for women.[21] Women are eligible as jurors in the federal courts of all the states. 28 U.S.C. §1861.

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[18] *1960 Handbook on Women Workers*, U.S. Department of Labor, Bulletin 275, p. 30.

[19] Note that the Court in *Rawlins* pointed out that there was no prejudice to the defendant by the exclusion (p. 640).

[20] *1950 Census of Population*, Vol. 2, *Characteristics of the Population*, Table 25, pp. 10-40, shows that in 1950 the total population of the state was 2,771,305, of whom 1,404,388 were females.

[21] *1960 Handbook on Women Workers*, U.S. Department of Labor, Bulletin 275, p. 134, classifies the states in accordance with their laws for women jurors. However, compilation, at least, as to the State of Florida, is inaccurate.

Note that at the time of the *Fay* case, women were barred from jury service in thirteen states, *Fay* v. *New York*, 332 U.S. 261, p. 289, footnote 31, while today they are only barred from such service in three.

It is the facts of 1957, and not of 1866,[22] which govern the interpretation of the equal protection clause. This Court so held after extensive briefing on the intention of the framers of the Amendment.[23] *Brown* v. *Board of Education of Topeka*, 347 U.S. 483.

Segregation was judicially abolished "because the record of history, properly understood, left the way open to, in fact, invited, a decision based on the moral and material state of the Nation in 1954, not 1866." [24] This same record of history[25] now invites judicial abolition by this Court of exclusion of women from juries.

4. *Appellant Was Prejudiced by the Exclusion of Women.*

When *Ballard* v. *United States*, 329 U.S. 187, and *Fay* v. *New York*, 332 U.S. 261 were decided, the only facts available to this Court indicated that women when sitting as jurors did not tend to act as a class. *Ballard* v. *United States*, 329 U.S. 187.[26] However, recent studies made at the University of Chicago indicate that there is indeed a difference between the functioning of men and women as jurors. In the sociologists' jargon, women have been

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[22] In 1870 less than fifteen percent of all women sixteen years of age and over were breadwinners. *Women at Work, a Century of Industrial Progress*, U.S. Department of Labor, Women's Bureau (1933).

[23] See the article of Bickel, *The Original Understanding and the Segregation Decision*, 69 Harvard Law Review, 1-65 (1955), where the author examines most carefully the intentions of the framers and the Legislators ratifying the Amendment. See also questions posed by this Court in 345 U.S. 972.

[24] Bickel, *op. cit.*, p. 65.

[25] Bickel specifically points out that the same evidence applicable to segregation applies to jury service. *Op. cit.*, pp. 56, 64.

[26] At p. 193.

classified as showing more "social and emotional specialization", while men are more "task-oriented". Women tend to play the role of mediators, and to break tensions more than men. "Sex-typed differentiation" in the inter-action between men and women in jury deliberations "*can be reliably demonstrated.*" (Emphasis supplied.) Strodtbeck and Mann, *Sex Role Differentiation in Jury Deliberations*, 19 Sociometry 3 (March, 1956).

In addition to a difference in the role that women play on juries, what is even more important is that women as a group differ in their voting patterns. See figures reported in Strodtbeck & James, *An Attempted Replication of a Jury Experiment by Use of Radio and Newspapers*, 21 Public Opinion Quarterly, pp. 313-318 (Spring, 1957). Such voting patterns are particularly evident in cases involving the home and juveniles. See Rudolph, *Women on Juries —Voluntary or Compulsory*, 44 Journal of the Am. Jud. Soc., No. 11, p. 206 at 210 (April, 1961), where the author reports information obtained from an interview with Rita N. James, one of the authors of the article in the Public Opinion Quarterly.

The case at bar obviously involves the home and marital problems. The Appellant's claim is that she killed her unfaithful husband during a moment of severe emotional crisis. The question of whether her actions "evinced a depraved mind" is one where husbands and wives may differ. Indeed, it is impossible to conceive of a case where differences in voting patterns between men and women would show more strongly.

Appellant submits that she has shown prejudice, that "the procedure has gone so far afield that its results are a denial of equal protection and due process" even under

the strict views expressed in *Fay* v. *New York*, 332 U.S. 261.[27]

Where prejudice is shown to an individual as a result of state action, there must be a balancing by this Court of the interests of the state and the rights of the individual. Appellant submits that the interest of the community is not served by this statute. In any event, the prejudice to this Appellant as compared to the negligible interest of the community, especially in view of the far more reasonable alternatives available to the state, should lead this Court to hold the statute unconstitutional.

B. The Action of the Jury Commissioners in Arbitrarily and Systematically Limiting the Number of Women on the Jury Panel, Denied Appellant the Equal Protection of the Laws.

The undisputed evidence shows a consistent pattern limiting the number of women on the jury list to ten (R. 12-20). This number was determined without regard to the number of women registered for jury service. In fact, in 1957, the year Appellant was tried, the registration list was not even consulted, because not a single woman had been drawn out the entire year 1956. The set number of ten names remained from the preceding year's list.

The limitation was not authorized by the Florida statute. Nor was it an equal application of the laws to men and

[27] Both the equal protection and the due process clauses are here violated whether or not trial by jury is a "fundamental right" within the due process clause. (See *Reid* v. *Covert*, 354 U.S. 1 at p. 9.) Even if Florida can constitutionally abolish trial by jury, it cannot discriminate among similarly situated persons in granting the right of a trial by jury. Cf. *Griffin* v. *Illinois*, 351 U.S. 12. It cannot discriminate in the constitution of its juries, where such discrimination results in prejudice to the Appellant without denying Appellant due process of law.

women. Even if the Florida Statute were constitutional, nevertheless, the State may not discriminate in the application of the law. *Griffin* v. *Illinois,* 351 U.S. 12; see *Goesaert* v. *Cleary,* 335 U.S. 464 at 466.

No reason can be advanced for limiting the number of women in the jury box to ten each year, regardless of the number of women who volunteered for jury service. Any such limitation is unconstitutional. *Cassell* v. *Texas,* 339 U.S. 282; *Truax* v. *Raich,* 239 U.S. 33.

Appellant submits that the undisputed evidence shows a consistent pattern of exclusion within the principles of *Norris* v. *Alabama,* 294 U.S. 587.

Although the trial judge found that the percentage of women exceeded the percentage of eligible men (R. 24), this was the result of an arithmetical error. Apparently, the Supreme Court of Florida was unaware of this error, for it concluded that "the number so included was proportionately at least a fair representation of the total number of eligible women registered for jury service" (R. 31). These findings are not binding on this Court. Where federal rights are claimed, this Court will re-examine the facts to safeguard such rights. *Norris* v. *Alabama,* 294 U.S. 587.

Moreover, even if the proportion of eligible women had been equivalent to the proportion of eligible men so as to substantiate the mathematical findings of the Florida courts, any intentional limitation without rational basis, proportional or otherwise, is invalid. *Cassell* v. *Texas,* 339 U.S. 282; *Truax* v. *Raich,* 239 U.S. 33.

VII.

Conclusion

For the reasons submitted, the conviction of Appellant should be reversed.

Respectfully submitted,

HERBERT B. EHRMANN
RAYA S. DREBEN
C. J. HARDEE, JR.
CARL C. DURRANCE